

argue that microwave facilities can be affected by both climate and vegetation, so a full year trial period is necessary to determine whether any foliage or weather changes affect the operation of the replacement system.¹³⁶ Incumbents also contend that, if a problem arises, the twelve-month trial period should either freeze or begin again after the problem is resolved to ensure that the problem does not arise again.¹³⁷ In addition, the Kansas Department of Transportation asks that we clarify whether the PCS licensee is obligated to remedy a problem after the twelve-month period has expired if the problem was reported prior to the end of the twelve-month period.¹³⁸

47. Discussion. As a preliminary matter, we clarify that the twelve-month trial period is only automatic if an involuntary relocation occurs. Therefore, if the parties decide that a trial period should be established for relocations that occur during the voluntary and mandatory period, they must provide for such a period in the relocation contract.

48. Because our proposed clarifications to the twelve-month trial period received broad record support,¹³⁹ we adopt the following clarifications to Section 94.59(e) of our rules:

- (1) the trial period will commence on the date that the incumbent begins full operation (as opposed to testing) on the replacement link; and
- (2) an incumbent's right to a twelve-month trial period resides with the incumbent as a function of our relocation rules, regardless of whether the incumbent has previously surrendered its license. If, however, a microwave licensee has retained its 2 GHz authorization during the trial period, it is required to return the license to the Commission at the conclusion of that period.¹⁴⁰

We decline to adopt the suggestion that the twelve-month trial period should be extended or begin again if a problem arises.¹⁴¹ We conclude that incumbents are adequately protected without such an extension because, by the end of the twelve month period, our rules require

¹³⁶ See, e.g., SoCal Gas Company Comments at 13.

¹³⁷ Kansas DOT Comments at 1; UTC Comments at 27-28.

¹³⁸ Kansas DOT Comments at 1.

¹³⁹ See, e.g., API Comments at 18; GTE Comments at 18; UTC Comments at 27-28.

¹⁴⁰ In our initial rule, 47 C.F.R. § 94.59(c), we stated that we would convert the microwave incumbent to secondary status after the replacement system is built and the microwave incumbent has been provided with a reasonable amount of time to determine comparability. We see no reason, however, for the incumbent to retain its 2 GHz license once it has been relocated.

¹⁴¹ Kansas DOT Comments at 1; UTC Comments at 27-28.

that they be operating on facilities that are comparable.¹⁴² If at the end of the twelve months the PCS licensee has still failed to meet this requirement, it must relocate the incumbent back to its former or equivalent 2 GHz frequencies.¹⁴³ Thus, the expiration of the twelve-month period does not leave the incumbent without further recourse.

49. As a related matter, we clarify that, even after the PCS licensee has initiated the involuntary relocation process, a mutually acceptable agreement will still be permissible. If the parties do sign an agreement specifying their own terms, we will treat the agreement in the same manner as we treat agreements that are consummated during the voluntary and mandatory periods, and the parties will be bound by contract rather than our rules. We agree with commenters that neither incumbents nor PCS licensees are harmed by such a policy, because neither party is obligated to enter into such an agreement.¹⁴⁴ If the agreement falls through, however, the incumbent will be subject to involuntary relocation.

50. Finally, we decline to reduce the trial period to one month as suggested by PCS licensees.¹⁴⁵ We agree with incumbents that twelve months is an appropriate time period, because it gives the incumbent the opportunity to ensure that the facilities function properly during changes in climate and vegetation.¹⁴⁶ We also take this opportunity to clarify that PCS licensees are not required to leave the incumbent's former 2 GHz spectrum vacant during the twelve-month trial period.¹⁴⁷ We agree with PCIA that requiring PCS licensees to hold this spectrum in reserve would delay the deployment of PCS for at least one year, which does not serve the public interest.¹⁴⁸ We also clarify that, if the microwave incumbent demonstrates that the new facilities are not comparable to the former facilities, the PCS licensee must remedy the defects or pay to relocate the microwave licensee to one of the following: its former or equivalent 2 GHz channels, another comparable frequency band, a land-line system, or any other facility that qualifies as comparable.

e. Request for Clarification of Involuntary Relocation Procedures

51. Background. In an *ex parte* letter submitted on April 15, 1996, AT&T Wireless and six other PCS licensees urge the Commission to clarify or amend its rules governing

¹⁴² 47 C.F.R. § 94.59(d).

¹⁴³ 47 C.F.R. § 94.59(e).

¹⁴⁴ Western Comments at 16; BellSouth Comments at 11; Chester Telephone, Reply Comments at 5.

¹⁴⁵ See, e.g., PCS PrimeCo Comments at 19.

¹⁴⁶ See, e.g., SoCal Gas Company Comments at 13.

¹⁴⁷ PCIA Comments at 25.

¹⁴⁸ PCIA Comments at 25; PCS PrimeCo Comments at 19-20.

involuntary relocation.¹⁴⁹ These parties contend that "the Commission's procedures are vague with respect to the procedures to be followed at the end of the mandatory negotiation period."¹⁵⁰ They note that under our existing rules, a PCS licensee requesting an incumbent to relocate involuntarily must guarantee payment of relocation costs, complete all activities necessary to place the new facilities into operation, and build and test the replacement system. They further note, however, that the rules do not specify whether the parties must agree on relocation costs, what constitutes an adequate relocation system, or the time frame in which relocation is to occur. AT&T Wireless, *et al.*, express concern that the lack of specific procedures for involuntary relocation may create incentives for microwave incumbents to prolong negotiations beyond the expiration of the mandatory negotiation period and cause further delays in the relocation process.¹⁵¹ Therefore, AT&T Wireless, *et al.*, request that the Commission either (1) require microwave incumbents to vacate their 2 GHz frequencies by the end of the mandatory negotiation period, or (2) automatically convert microwave licenses to secondary status immediately upon expiration of the mandatory negotiation period.¹⁵²

52. Discussion. We believe that AT&T Wireless, *et al.*, have raised legitimate issues regarding the procedures for implementing involuntary relocation at the conclusion of the mandatory negotiation period. The issues raised in their letter, however, were not included in the *Cost-Sharing Notice*, nor were they raised in any of the regularly filed comments or reply comments in this proceeding. Because of the relative lateness of the parties' *ex parte* filing and the lack of opportunity for other parties to comment, we decline to address these issues at this time. Nevertheless, we encourage the parties to the April 15 letter or any other interested parties to file a petition for rulemaking on the issues raised in the letter.

4. Public Safety Certification

53. Background. In the *ET Third Report and Order*, we concluded that a select group of public agencies should qualify for extended voluntary and mandatory negotiation periods under our rules.¹⁵³ Section 94.59 of our rules limits the privilege of extended negotiation

¹⁴⁹ Letter from AT&T Wireless Services, Inc., BellSouth Personal Mobile Communications, GTE Mobilnet, PCS Primeco, L.P., Western Wireless Corp., DCR Communications, and Pacific Bell Mobile Services to Michele Farquhar, Chief, Wireless Telecommunications Bureau, April 15, 1996 ("April 15 Letter").

¹⁵⁰ *Id.* at 1.

¹⁵¹ *Id.* at 2.

¹⁵² *Id.* at 3.

¹⁵³ *ET Third Report and Order*, 8 FCC Rcd at 6610-11, ¶¶ 52, as modified on reconsideration by *ET Memorandum Opinion and Order*, 9 FCC Rcd at 1943 ¶¶ 36-41. On February 16, 1996, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion affirming our decision in ET Docket 92-9 that public safety licensees are required to relocate if their 2 GHz spectrum is needed by a PCS licensee. *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

periods to the following licensees: Part 94 facilities currently licensed on a primary basis under the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Services; and Subpart C of Part 90, Special Emergency Radio Services, provided that the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property.¹⁵⁴ Licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.¹⁵⁵

54. PCIA requested that we allow PCS licensees access to information essential to confirm that a microwave licensee qualifies for the extended transition period reserved for emergency public safety uses.¹⁵⁶ In the *Cost-Sharing Notice*, we agreed with PCIA that PCS licensees should have a readily available means of confirming a microwave licensee's public safety status for purposes of our relocation rules.¹⁵⁷ We proposed that the public safety licensee should be required to establish: (1) that it qualifies as a service listed in Section 94.59(f) of our rules (*see* classifications listed in previous paragraph), (2) that it is a licensee in one or more of these services, and (3) that the majority of communications carried on the facilities involve safety of life and property.¹⁵⁸ We also proposed that the public safety licensee should be required to provide such documentation to the PCS licensee promptly upon request.¹⁵⁹ If the incumbent failed to provide the PCS licensee with the requisite documentation, we proposed that the PCS licensee would be permitted to presume that special treatment is inapplicable to the incumbent.¹⁶⁰

55. Comments. APCO, which represents numerous public safety incumbents, argues that PCS licensees should not be allowed to force government agencies to meet burdensome reporting requirements regarding the nature of their communications traffic.¹⁶¹ The City of San Diego further states that our proposal is unworkable, because there is no objective, quantitative

¹⁵⁴ 47 C.F.R. § 94.59(f).

¹⁵⁵ *Id.* Although this sentence of the rule did not appear in the *Cost-Sharing Notice*, we confirm that this additional class of licensees might also qualify for public safety status. *See, e.g.,* APCO Comments at 10 (requesting clarification).

¹⁵⁶ PCIA Ex-Parte Filing, Oct. 4, 1995.

¹⁵⁷ *Cost-Sharing Notice*, 11 FCC Rcd at 1961, ¶ 80.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ APCO Comments at 11.

measure for making a satisfactory public safety demonstration.¹⁶² To address these concerns, the City of San Diego suggests that we should allow public safety entities to self-certify that they meet the appropriate criteria.¹⁶³ PacBell urges us to reject the self-certification method, however, because it contends that self-certification places the determination in the hands of a party that is biased in favor of claiming public safety status.¹⁶⁴ PacBell suggests that a public safety licensee's capacity should be determined by the initial channel loading contained in the incumbent's Form 402 application, and that the incumbent should only qualify for extended relocation if over half of those channels carry communications involving the safety of life or property.¹⁶⁵ AT&T proposes that we require public safety licensees to petition the Commission immediately to obtain public safety status, and that the public safety licensee be required to certify to the PCS licensee that it has obtained such status as soon as the petition is granted.¹⁶⁶ As a related matter, PCIA argues that, in addition to requiring appropriate documentation, the Commission should narrow the definition of public safety by requiring those incumbents seeking longer negotiation periods to establish that substantially all -- rather than a majority -- of the communications carried on their facilities involve safety of life and property. PCIA claims that narrowing the definition even further is appropriate because the extended relocation periods can delay the deployment of PCS.¹⁶⁷

56. Discussion. We agree with PCS licensees that certification is necessary to ensure that only those public safety incumbents meriting special status are allowed the advantages of extended negotiation periods.¹⁶⁸ We also agree with incumbents, however, that self-certification is appropriate, because self-certification will not burden public agencies with time-consuming reporting requirements.¹⁶⁹ We decline to adopt the suggestion made by AT&T that all public safety incumbents should be required to apply to the Commission for certification, because such a requirement would be administratively burdensome for the Commission and

¹⁶² City of San Diego Comments at 12.

¹⁶³ See, e.g., City of San Diego Comments at 13.

¹⁶⁴ PacBell Reply Comments at 9.

¹⁶⁵ PacBell Comments at 11. As an example, PacBell states that, if the licensee's initial channel loading is for 100 channels, the licensee would only qualify for extended relocation if 51 of those channels carried communications involving the safety of life or property.

¹⁶⁶ AT&T Comments at 14.

¹⁶⁷ PCIA Comments at 27.

¹⁶⁸ AT&T Comments at 14; BellSouth Comments at 12; PCIA Comments at 25.

¹⁶⁹ See, e.g., APCO Comments at 11.

could delay negotiations.¹⁷⁰ Furthermore, we believe that PacBell's concerns about biased public agencies are overstated, because we do not believe public agencies will be inclined to falsify the certification.¹⁷¹

57. We conclude that, in order for a public safety licensee to qualify for extended negotiation periods under our rules, the department head responsible for system oversight must certify to the PCS licensee requesting relocation that:

- (1) the agency is a licensee in the Police Radio, Fire Radio, Emergency Medical, Special Emergency Radio Services, or that it is a licensee of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C; and
- (2) the majority of communications carried on the facilities at issue involve safety of life and property.

A public safety licensee must provide certification within 30 days of a request from a PCS licensee or the PCS licensee may presume that special treatment is inapplicable to the incumbent. If an incumbent falsely certifies to a PCS licensee that it qualifies for the extended time periods, the incumbent will be in violation of our rules and subject to appropriate penalties.¹⁷² Such an incumbent would also immediately become subject to the non-public safety time periods.

5. Dispute Resolution

58. Because relocations that occur pursuant to agreements arrived at during the voluntary and mandatory period are relocations pursuant to private contracts, we anticipate that parties will pursue common law contract remedies if a dispute arises. Thus, if parties do not agree to use alternative dispute resolution techniques, we expect that they will file suit in a court of competent jurisdiction.

¹⁷⁰ AT&T Comments at 14. Note that, prior to the release of this order, South Florida Water Management District ("South Florida") filed a petition for declaratory ruling that its 2 GHz microwave network constitutes a "public safety facility" for purposes of our relocation rules. The Wireless Telecommunications Bureau stated that "[w]hile South Florida's communications are very important, we cannot conclude on balance that a microwave system whose primary function is to monitor and control gates and levees to adjust water levels meets the Commission's narrow standard for obtaining a longer relocation period." See Petition for Declaratory Ruling Regarding the definition of "public safety facility" for purposes of Section 94.59 of the Commissions Rules, DA 96-505 (released April 10, 1996).

¹⁷¹ PacBell Reply Comments at 9.

¹⁷² See, e.g., 47 U.S.C. §§ 312, 503.

59. To the extent that disputes arise over violation of the Commission's rules (e.g., the good faith requirement, involuntary relocation procedures), we have stated that parties are encouraged to use ADR techniques.¹⁷³ Commenters agree that resolution of such disputes entirely by our adjudication processes would be time consuming and costly to all parties.¹⁷⁴ Therefore, we continue to encourage parties to employ ADR techniques when disputes arise.

6. Ten Year Sunset

60. Background. In the initial *Notice of Proposed Rule Making* in the *Emerging Technologies* docket, adopted on January 16, 1992, we proposed to allow unrelocated microwave incumbents to continue to occupy their 2 GHz frequency for a fixed period of time -- possibly 10-15 years -- at which time they would be converted to secondary status.¹⁷⁵ We suggested a 10-15 year time frame, because we estimated that most 2 GHz equipment would be completely amortized or need replacement by the time the period expired.¹⁷⁶ In the *ET Third Report and Order*, we decided not to make incumbent facilities secondary on a fixed date, but we reserved the option of revisiting the issue in the future.¹⁷⁷

61. In the *Cost-Sharing Notice*, we sought comment on whether we should place some time limit on a PCS licensee's obligation to provide comparable facilities.¹⁷⁸ As an example, we cited to our decision in GEN Docket 82-334, which gave private operational fixed microwave stations in the 12 GHz band five years to relocate their facilities, after which time they became secondary to the Direct Broadcast Satellite ("DBS") Service.¹⁷⁹ In the *Cost-Sharing Notice*, we tentatively concluded that microwave incumbents should not retain primary status indefinitely on spectrum licensed for PCS and, therefore, microwave incumbents that are still operating in the 1850-1990 MHz band on April 4, 2005, should be

¹⁷³ *ET Third Report and Order*, 8 FCC Rcd at 6604, ¶¶ 38-39; *ET Second Memorandum Opinion and Order*, 9 FCC Rcd at 7801, ¶ 28. Information regarding the use of alternative dispute resolution is available from the Commission's Designated ADR Specialist, ADR Program, Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554. See *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669 (1991). See also GTE Comments at 18.

¹⁷⁴ See, e.g., GTE Comments at 18.

¹⁷⁵ *ET Notice of Proposed Rule Making*, 7 FCC Rcd at 1545, ¶ 24. See also *ET First Report and Order*, 7 FCC Rcd at 6886, ¶ 4.

¹⁷⁶ *Id.*

¹⁷⁷ *ET Third Report and Order*, 8 FCC Rcd at 6596, ¶ 18.

¹⁷⁸ *Cost-Sharing Notice*, 11 FCC Rcd at 1965, ¶ 90.

¹⁷⁹ Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz, *First Report and Order*, GEN Docket No. 82-334, 54 RR 2d 1001.

made secondary on that date.

62. Comments. We received a considerable number of comments on this issue, particularly from incumbents with microwave links in rural areas. They argue, *inter alia*, that such a policy will encourage PCS licensees to "wait out" incumbents, and will increase the likelihood that incumbents will have to assume the costs of their own relocation.¹⁸⁰ Many incumbents point out that the deployment of PCS is likely to be delayed in rural areas and, therefore, the sunset date is likely to penalize those entities with extensive rural networks.¹⁸¹ APCO also argues that some incumbents (including public safety licensees) may still be operating links in urban areas after 2005, because 6 GHz and other replacement bands may not be able to accommodate all of the current 2 GHz licensees.¹⁸² Moreover, incumbents contend that such a policy is not "spectrum efficient," because microwave incumbents might be forced to vacate frequencies that PCS licensees may never need or use.¹⁸³ As an alternative, incumbents suggest that, if clearing the band is a priority, the Commission should modify its proposal by imposing a requirement that all 2 GHz licensees must offer to relocate all incumbents in their frequency block before the year 2005.¹⁸⁴ Assuming that we adopt such a sunset, UTC points out that the 2005 date unfairly impacts those incumbents in the C, D, E, and F bands, which have not yet been licensed for PCS, because those incumbents will have less than ten years to negotiate or plan for relocation.¹⁸⁵

63. One microwave incumbent, CIPCO, agrees that a ten-year period is adequate to complete relocation from 2 GHz.¹⁸⁶ CIPCO submits that, even if all paths are not relocated by that time, it should be able to determine potential exposure and schedule any necessary non-reimbursed relocations.¹⁸⁷ Furthermore, CIPCO anticipates that, given the rural nature of its service territory, it will be able to operate some paths on a secondary basis indefinitely.¹⁸⁸

64. PCS licensees support our proposal to convert the remaining incumbents operating

¹⁸⁰ See, e.g., AAR Comments at 8; APPA Comments at 5.

¹⁸¹ See, e.g., AAR Comments at 8-9; AGA Comments at 5; API Comments at 19; UTC Comments at 32.

¹⁸² APCO Comments at 13.

¹⁸³ UTC Comments at 32; APCO Comments at 12; APPA Comments at 5-6.

¹⁸⁴ See, e.g., APPA Comments at 6; SoCal Gas Company Comments at 13.

¹⁸⁵ UTC Comments at 32.

¹⁸⁶ CIPCO Comments at 2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

in the 2 GHz band to secondary status in the year 2005.¹⁸⁹ BellSouth argues that microwave incumbents would not be harmed significantly by such a conversion, because their equipment should be fully amortized by the year 2005.¹⁹⁰ UTAM also supports our proposal, arguing (1) that the entire unlicensed spectrum band must be cleared of all microwave incumbents in order to have full deployment of unlicensed PCS devices -- particularly nomadic devices, and (2) that ten years is ample time for necessary relocations to take place.¹⁹¹ Other PCS licensees agree with the ten-year time period, but assert that incumbents should be converted to secondary status sooner if no agreement is reached by the end of the mandatory negotiation period, or if the incumbent negotiates in bad faith.¹⁹²

65. Discussion. As we stated in the *Cost-Sharing Notice*, we continue to believe that an emerging technology licensee's obligation to relocate 2 GHz microwave incumbents should not continue indefinitely; however, we are also persuaded by incumbents that immediate conversion to secondary status in the year 2005 may not be necessary, especially with respect to rural links that would not interfere with any PCS systems.¹⁹³ To strike a fair balance between these competing interests, we conclude that 2 GHz microwave incumbents will retain primary status unless and until an emerging technology licensee requires use of the spectrum, but that the emerging technology licensee will not be obligated to pay relocation costs after the relocation rules sunset, *i.e.* ten years after the voluntary period begins for the first emerging technology licensees in the service (which is April 4, 2005, for PCS licensees and unlicensed PCS). Once the relocation rules sunset, an emerging technology licensee may require the incumbent to either cease operations or pay to relocate itself to alternate facilities, provided that the emerging technology licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10-F or any standard successor thereto. Notification must be in writing, and the emerging technology licensee must provide the incumbent with no less than six months to vacate the spectrum.¹⁹⁴ After the six-month notice period has expired, the incumbent will be required to turn its 2 GHz license back into the Commission, unless the parties have entered into an agreement which allows the

¹⁸⁹ See, e.g., AT&T Comments at 13; BellSouth Reply Comments at 20.

¹⁹⁰ BellSouth Reply Comments at 20 (citing to the *Emerging Technologies Notice*, 7 FCC Rcd at 1545).

¹⁹¹ UTAM Comments at 19.

¹⁹² See, e.g., Western Comments at 16.

¹⁹³ UTC Comments at 32; APCO Comments at 12; APPA Comments at 5-6 (stating that the Puerto Rico Electric Power Authority, the Navajo Tribal Utility Authority, and the Farmington, New Mexico Electric Utility System all operate microwave links in the 2 GHz bands that might never pose a problem to emerging technology services).

¹⁹⁴ Emerging technology licensees may provide notice prior to the date that the relocation rules sunset, but may not turn on their systems until after that date. For example, if a PCS licensee intends to turn on a base station which will interfere with an incumbent's system on April 4, 2005, the PCS licensee must notify the incumbent of its intent by October 4, 2004.

incumbent to continue to operate on a mutually agreed upon basis. We conclude that our decision promotes spectrum efficiency, because it allows microwave incumbents to continue to operate in the 2 GHz band until their spectrum is needed by an emerging technology licensee.

66. We believe that a sunset date for our microwave relocation rules serves the public interest, because it provides certainty to the process and prevents the emerging technology licensee from being required to pay for relocation expenses indefinitely. Moreover, we agree with commenters that ten years provides incumbents with sufficient time (1) to negotiate a relocation agreement or (2) to plan for relocation themselves.¹⁹⁵ In fact, well over ten years will have passed since we first announced our intention to reallocate 2 GHz spectrum to foster the introduction of emerging technologies services in 1992.¹⁹⁶ In other services, we have provided incumbents with even less time to complete relocation. For example, private operational fixed microwave stations in the 12 GHz band received only five years to relocate their facilities before they became secondary to the Direct Broadcast Satellite ("DBS") Service.¹⁹⁷

67. We also believe that adopting a sunset date is important, because it will provide 2 GHz microwave incumbents with an incentive to relocate to other bands when it comes time to change or replace their equipment. At the current time, our licensing records indicate that most 2 GHz microwave incumbents use analog equipment. APCO contends that operating 2 GHz analog microwave systems is becoming infeasible, because analog systems are now outdated and replacement parts will soon be difficult, if not impossible, to find.¹⁹⁸ APCO also states that most incumbents have long-term plans to replace their analog systems with digital systems once the useful life of current equipment has expired and/or adequate funding has been found.¹⁹⁹ As BellSouth points out, by the time the sunset date arrives, much of the microwave equipment operating today at 2 GHz is likely to be either fully amortized or in need of replacement.²⁰⁰ We believe that informing 2 GHz incumbents that they will have to cover their own relocation expenses after ten years will encourage incumbents to relocate to another band when they replace existing equipment. By contrast, if emerging technology licensees are required to pay to relocate incumbents regardless of when the relocation occurs, incumbents will have little incentive to make such a transition to an alternate band voluntarily.

¹⁹⁵ See, e.g., CIPCO Comments at 2; BellSouth Reply Comments at 20-21.

¹⁹⁶ See *ET First Report and Order*, 7 FCC Rcd 6886; see also BellSouth Reply Comments at 20.

¹⁹⁷ Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz, *First Report and Order*, GEN Docket No. 82-334, 54 RR 2d 1001.

¹⁹⁸ APCO Comments at 6-7.

¹⁹⁹ *Id.*; see also County of LA Comments at 5, n. 1 (stating that the microwave industry is moving to digital technology).

²⁰⁰ BellSouth Reply Comments at 21.

For similar reasons, we reject the argument by incumbents that PCS licensees should be required to make relocation offers prior to the sunset date to all incumbents located within their market area.²⁰¹ Again, incumbents would have no incentive to change out their own systems voluntarily if they knew that PCS licensees would be required to cover the expenses for them at a later date. Furthermore, even if we had not reallocated the spectrum, these incumbents would have had to plan ahead for repair costs, replacement equipment, and infrastructure improvement. Given that most incumbents will incur significant expenses in any event when they replace their analog system with digital equipment, we believe that providing an incentive to incumbents to relocate voluntarily at the same time they purchase new equipment serves the public interest. In sum, we believe that the benefits of imposing a sunset date outweigh the burdens, if any, that such a date may impose.

68. Finally, we believe that six months is a reasonable amount of time for most incumbents to relocate their facilities, especially because they will have been on notice for ten years that they might be requested to move. Nevertheless, we acknowledge that special circumstances might warrant an extension of the six-month period in some instances to enable the incumbent to complete relocation activities. If the incumbent is unable to move or cannot complete relocation in time, we encourage the parties to negotiate a mutually acceptable solution. In the event that the parties cannot agree on a schedule or an alternative arrangement, we will entertain extension requests on a case-by-case basis. However, we intend to grant such extensions only if the incumbent can demonstrate that: (1) it cannot relocate within the six-month period (*e.g.*, because no alternative spectrum or other reasonable option is available), and (2) the public interest would be harmed if the incumbent is forced to terminate operations (*e.g.*, if public safety communications services would be disrupted).

B. Cost-Sharing Plan

1. Overview

69. Background. In the *Cost-Sharing Notice*, we proposed a cost-sharing plan that would allow PCS licensees that relocate microwave links outside their license areas to receive reimbursement from later-entrant PCS licensees that benefit from the clearing of their spectrum.²⁰² Under the proposal, PCS licensees would receive "reimbursement rights" once they sign a relocation agreement with a microwave incumbent.²⁰³ Subsequent PCS licensees that would have caused harmful interference to relocated links would be required to reimburse the holder of the reimbursement rights for a *pro rata* share of the actual cost of relocating

²⁰¹ See, *e.g.*, Tenneco Comments at 14-15.

²⁰² *Cost-Sharing Notice*, 11 FCC Rcd at 1933 ¶¶ 20-67.

²⁰³ *Id.* at ¶¶ 46-49.

microwave facilities.²⁰⁴ The *pro rata* share that each new PCS provider pays would be calculated according to a cost-sharing formula that considers, among other things, the date that the PCS licensee begins service, the amount paid to relocate the link, and the number of licensees that have previously contributed to paying the relocation cost of the link.²⁰⁵ We also proposed that a non-profit clearinghouse be established to administer the cost-sharing plan.²⁰⁶

70. Comments. Most commenters, including microwave incumbents, A and B block PCS licensees, and potential bidders in future PCS auctions, generally support our proposed cost-sharing plan, although each group suggested minor modifications. A and B block PCS licensees ask, among other things, that we clarify that private cost-sharing agreements unrelated to the plan adopted by the Commission are permissible.²⁰⁷ Microwave incumbents request permission to be included in the cost-sharing plan in order to collect reimbursement from subsequent PCS licensees if they choose to relocate their own links.²⁰⁸ A few potential bidders for future PCS licenses argue that the benefit of being first in the marketplace far outweighs the burden of bearing the costs of relocation, and that such costs should not be passed on to subsequent licensees.²⁰⁹

71. Discussion. We adopt our proposed plan with a few modifications suggested by commenters. We believe that cost-sharing serves the public interest because (1) it will distribute relocation costs more equitably among PCS licensees, and (2) it will promote the relocation of entire microwave systems at once, which will benefit microwave incumbents. We also believe that cost-sharing will accelerate the relocation process for the PCS band as a whole, thus promoting more rapid deployment of service to the public. Furthermore, we conclude that the benefits of cost-sharing outweigh the costs that may be incurred by licensees who become subject to reimbursement obligations. Under the plan, these licensees will be required to pay reimbursement obligations only when they have benefitted from the spectrum-clearing efforts of another party. Moreover, as discussed in greater detail below, we are adopting limits on reimbursement to ensure that licensees subject to the plan do not bear a disproportionate cost. We conclude that these provisions amply protect the interests of such licensees.

72. Under our cost-sharing plan, a PCS licensee obtains reimbursement rights for a particular link on the date that it signs a relocation agreement with the microwave incumbent

²⁰⁴ *Id.*

²⁰⁵ *Id.* at ¶¶ 29-31.

²⁰⁶ *Id.* at ¶¶ 63-65.

²⁰⁷ *See, e.g.,* PCIA Comments at 37; PacBell Comments at 6; AT&T Comments at 6.

²⁰⁸ *See, e.g.,* API Comments at 17.

²⁰⁹ *See, e.g.,* Iowa L.P. Comments at 5-6; MEANS Comments at 1-2.

operating on the link at issue. Within ten business days of the date the agreement is signed, the PCS licensee submits documentation of the agreement to a non-profit clearinghouse, which will be selected by the Wireless Telecommunications Bureau ("Bureau") as discussed in Section IV(B)(3), *infra*. If the clearinghouse has not yet been selected, the PCS relocater will be responsible for submitting documentation of a relocation agreement within ten business days of the date that the Bureau announces that the clearinghouse has been established and has begun operation.

73. Prior to commencing commercial operation, each PCS licensee is required to send a prior coordination notification ("PCN") to all existing users in the area.²¹⁰ At the same time, each PCS licensee shall file a copy of the PCN with the clearinghouse. The clearinghouse will then apply an objective test to determine whether the proposed base station would have posed an interference problem to the relocated link.²¹¹ If the test shows that the proposed base station is close enough to have posed an interference problem, the clearinghouse will notify the subsequent licensee that it is required to reimburse the PCS relocater under the cost-sharing formula for a portion of the expenses the relocater incurred to move the link. UTAM will be required to reimburse PCS relocators who relocate microwave links that were operating in the unlicensed PCS band.

74. The clearinghouse will determine the amount that the subsequent PCS licensee must pay the relocater through the use of a cost-sharing formula. The formula takes into consideration such factors as the actual amount paid to relocate the link and the number of PCS licensees that would have interfered with the link. All calculations will be done on a per-link basis. The reimbursement amount also decreases over time to reflect the fact that the initial PCS relocater has received the benefit of being first to market, and to ensure that the PCS relocater pays the largest amount, which we believe will provide an incentive to the relocater to limit relocation expenses. As an additional protection for later-entrants, we have imposed a cap of \$250,000 per link, with an additional \$150,000 if a new or modified tower is required, on the amount that a PCS relocater may recoup for the relocation of each individual microwave link. PCS relocators are entitled to full reimbursement, up to the cap, for relocating non-interfering links fully outside their market area or licensed frequency band. Also, costs that are incurred prior to the selection of a clearinghouse will be reimbursable after a clearinghouse is established.

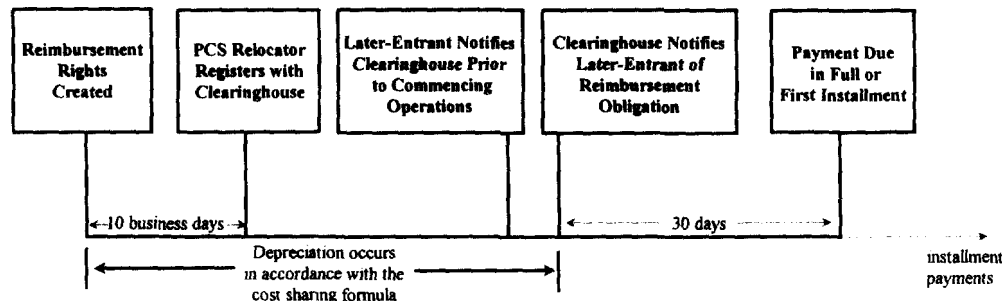
75. Once a PCS licensee receives written notification from the clearinghouse of its reimbursement obligation, it must pay the entire amount owed within thirty days,²¹² with the exception of those small businesses that qualify for installment payments under our auction

²¹⁰ 47 C.F.R. § 24.237; *see also* 47 C.F.R. § 21.100(d).

²¹¹ The interference test is described in detail in Appendix A, Section B.

²¹² The thirty day requirement refers to calendar days, not business days.

rules.²¹³ UTAM will be required to reimburse a PCS relocater once a county is cleared of enough microwave links to enable unlicensed PCS devices to operate. Because UTAM receives its funding in small increments over an extended period of time, UTAM will be permitted to satisfy its reimbursement obligation by making quarterly installment payments to the PCS relocater over a period of five years, at an interest rate of prime plus three percent. The following time line provides an overview of the cost-sharing process:



76. A detailed discussion of the mechanics of our cost-sharing plan is attached as Appendix A, which is incorporated by reference into this *First Report & Order*. The cost-sharing plan will sunset for all PCS licensees ten years after the date that voluntary negotiations commenced for A and B block licensees, on April 4, 2005. However, the sunset date will not eliminate the existing obligations of PCS licensees that are paying their portion of relocation costs on an installment basis. Those licensees must continue their payments until the obligation is satisfied. Finally, while we conclude that the cost-sharing plan is in the public interest, we are conditioning our adoption of these rules on a approval of an entity or organization to administer the plan, as discussed further in Section IV(B)(3), *infra*. Once an administrator is selected, the cost-sharing rules will take effect.

77. Participation in Cost-Sharing Plan. By this *Report and Order*, we mandate that all PCS licensees benefitting from spectrum clearance by other PCS licensees must contribute to such relocation costs. As we emphasized in the *Cost-Sharing Notice*, however, PCS licensees remain free to negotiate alternative cost-sharing terms.²¹⁴ We also agree with commenters that allowing PCS licensees to enter into such private agreements serves the public interest, because it adds flexibility to the cost-sharing process and may enable such

²¹³ See 47 C.F.R. § 24.711.

²¹⁴ *Cost-Sharing Notice*, 11 FCC Rcd at 1936, ¶ 29.

parties to save both time and the administrative expense of seeking reimbursement from a clearinghouse.²¹⁵ We therefore conclude that licensees are not required to participate in our cost-sharing plan if they enter into alternative cost-sharing agreements. We also agree with commenters that all parties to a separate agreement will still be liable under the cost-sharing plan to other PCS licensees that incur relocation expenses.²¹⁶ Finally, we conclude that parties to a private cost-sharing agreement may also seek reimbursement through the clearinghouse from PCS licensees that are not parties to the agreement.

2. Dispute Resolution Under the Cost-Sharing Plan

78. Background. In the *Cost-Sharing Notice*, we proposed that disputes arising out of the cost-sharing plan should be brought, in the first instance, to the clearinghouse for resolution.²¹⁷ To the extent that disputes cannot be resolved by the clearinghouse, we stated that parties should be encouraged to use ADR procedures, such as binding arbitration, mediation, or other ADR techniques.²¹⁸ We also asked whether parties should be required to submit independent appraisals of the incumbent's system to the clearinghouse at the time such disputes are brought to the clearinghouse for resolution.²¹⁹ Finally, we sought comment on the appropriate penalty for failure to comply with cost-sharing obligations.²²⁰

79. Comments. Commenters offer different views concerning the appropriate method of dispute resolution. Some licensees believe that the clearinghouse should resolve disputes to the extent possible and, if the dispute cannot be resolved, ADR should be required.²²¹ However, BellSouth disagrees that the clearinghouse should be required to attempt to resolve disputes and argues instead that all disputes should proceed immediately to ADR.²²² US Airwaves believes that dispute resolution should be flexible: first, use of the clearinghouse should be required, then use of ADR, and finally use of the court system.²²³ Also, US Airwaves argues that failure to comply with cost-sharing obligations should not be considered

²¹⁵ See, e.g., AT&T Comments at 6; GTE Comments at iii; PacBell Comments at 6.

²¹⁶ See, e.g., UTAM Reply Comments at 12-13; AT&T Comments at 6.

²¹⁷ *Cost-Sharing Notice*, 11 FCC Rcd at 1954, ¶ 67.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See, e.g., Sprint Comments at 30.

²²² BellSouth Comments at 13.

²²³ US Airwaves Comments at 8.

by the Commission when deciding renewal and/or transfer and assignment cases.²²⁴

80. Discussion. We agree with those commenters who argue that disputes arising out of the cost-sharing plan, such as disputes over the amount of reimbursement required, should be brought to the clearinghouse first for resolution.²²⁵ At the time the dispute is brought to the clearinghouse, the parties will be required to submit appropriate documentation, *e.g.*, an independent appraisal of the equipment expenses at issue, to support their position. To the extent that disputes cannot be resolved by the clearinghouse, we encourage parties to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR techniques. At this time, we do not designate a specific penalty for failure to comply with cost-sharing requirements; however, we emphasize that we intend to use the full realm of enforcement mechanisms available to us in order to ensure that reimbursement obligations are satisfied.

3. Administration of the Cost-Sharing Plan

81. Background. In our proposal, we recommended that an industry-supported clearinghouse be established to administer the cost-sharing proposal.²²⁶ The clearinghouse would maintain all of the cost and payment records related to the relocation of each link and would determine the cost-sharing obligation of subsequent PCS licensees.²²⁷ We sought comment on such issues as how the clearinghouse should be funded and whether records should be kept confidential.

82. Comments. A number of microwave incumbents support the establishment of a non-profit clearinghouse, but voice concerns about the confidentiality of the information filed with the clearinghouse. AAR believes that all microwave incumbents should be allowed to inspect and verify information pertaining to their systems,²²⁸ but SoCal argues that unless strict limitations are placed on access to the information filed with the clearinghouse, the confidentiality of PCS relocation agreements will be breached.²²⁹ AAR suggests that initial rules concerning the clearinghouse should be established in an open process, which incorporates the comments and balances the needs of all interested parties.²³⁰ PCS licensees

²²⁴ *Id.*

²²⁵ *See, e.g.*, Sprint Comments at 30.

²²⁶ *Cost-Sharing Notice*, 11 FCC Rcd 1953 at ¶¶ 63-64.

²²⁷ *Id.* at 10.

²²⁸ AAR Comments at 13.

²²⁹ SoCal Comments at 10-11.

²³⁰ AAR Comments at 13.

also generally support the concept of an industry-supported clearinghouse.²³¹ BellSouth recommends that the organization selected as clearinghouse should present a viable business plan for equitably securing start-up expenses and on-going funding, that it should have demonstrable experience with spectrum management, and that it should be fully operational 90 days from the date of selection.²³² Sprint agrees with the concept of a clearinghouse, provided that the entity does not make any engineering decisions and serves only an administrative function.²³³ Some commenters suggest that PCS licensees with private agreements should not be required to fund the clearinghouse's activities, except to the extent that they use the clearinghouse to obtain reimbursement from licensees that are not parties to the private agreement.²³⁴

83. On September 6, 1995, PCIA first stated its desire to serve as the clearinghouse administrator,²³⁵ a desire which it reiterated in comments filed on November 30, 1995.²³⁶ PCIA states that it has the necessary qualifications and resources, and that it has extensively explored the structure and functions of the clearinghouse.²³⁷ Chester Telephone, *et al.*, PacBell, and Sprint support designation of PCIA as the clearinghouse.²³⁸ UTC opposes PCIA as the clearinghouse, stating that a PCS trade industry association is not a neutral third party.²³⁹ In an *ex parte* presentation, filed April 18, 1996, ITA states that it also stands willing and able to serve as the designated clearinghouse administrator.²⁴⁰ ITA urges the Commission to solicit proposals from all entities having an interest in serving as the clearinghouse administrator, which would provide organizations with the opportunity to propose innovative procedures and safeguards that would promote the reimbursement process.²⁴¹

²³¹ See, e.g. US Airwaves Comments at 6-7; SBMS Comments at 8.

²³² BellSouth Comments at 14-15.

²³³ Sprint Comments at 30.

²³⁴ See, e.g., AT&T Comments at 6; GTE Comments at 12.

²³⁵ See PCIA's Proposal for a PCS Microwave Cost-Sharing Clearinghouse, RM-8643, (filed Sept. 6, 1995).

²³⁶ PCIA Comments at 40.

²³⁷ *Id.* at 39-42.

²³⁸ Chester Telephone, Reply Comments at 3; PacBell Reply Comments at 7, Sprint Reply Comments at 16.

²³⁹ UTC Reply Comments at 14.

²⁴⁰ ITA *ex parte* presentation (filed April 18, 1996).

²⁴¹ ITA Comments at 8.

84. Discussion. We agree with those commenters who suggest that the clearinghouse administrator should be selected through an open process.²⁴² We also believe it is essential for the plan to be administered by industry to the fullest extent possible. Therefore, before we implement the plan, we will seek specific proposals from parties who wish to act as administrator and will request public comment on any such proposals.

85. We delegate to the Wireless Bureau the authority to select one or more entities to create and administer a neutral, not-for-profit clearinghouse. Selection shall be based on criteria established by the Bureau. The Bureau shall publicly announce the criteria and solicit proposals from qualified parties. Once such proposals have been received, and an opportunity has elapsed for public comment on them, the Bureau shall make its selection. When the Bureau selects an administrator, it shall announce the effective date of the cost-sharing rules.

C. Licensing Issues

86. Background. In the *Cost-Sharing Notice*, we stated that allowing additional primary site grants in the 2 GHz band now that relocation negotiations are ongoing will unnecessarily impede negotiations and may add to the relocation obligations of PCS licensees.²⁴³ Nevertheless, we recognized that some minor technical changes to existing microwave facilities may be necessary for incumbents' continued operations. We also stated that we do not believe that these minor technical modifications will significantly increase the cost to a PCS licensee of relocating a particular link. Thus, while the rulemaking proceeding was pending, we continued to accept applications for primary status; however, we processed only minor modifications that would not add to the relocation costs of PCS licensees. Specifically, we granted primary status for the following limited number of minor technical changes: decreases in power, minor changes in antenna height, minor coordinate corrections (up to two seconds), reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and changes in equipment.²⁴⁴ Any other modifications were permitted only on a secondary basis, unless (1) a special showing of need justified primary status, and (2) the incumbent was able to establish that the modification would not add to the relocation costs of PCS licensees.²⁴⁵ In addition, we stated that we would carefully scrutinize any applications for transfer of control or assignment to

²⁴² See, e.g., ITA Comments at 8; AAR Comments at 13.

²⁴³ As we stated in the *ET Third Report and Order*, our goals in reallocating 2 GHz for emerging technologies were to provide for reaccommodation of existing 2 GHz fixed operations in a manner that would be advantageous to the incumbent licensee, not disrupt those communications services, and foster introduction of new services and devices. 8 FCC Rcd at 6590, ¶ 4.

²⁴⁴ *Cost-Sharing Notice*, 11 FCC Rcd at 1964, ¶ 89. Note: this list is more limited than the acceptable modifications listed in *Public Notice*, Mimeo No. 23115, May 14, 1992.

²⁴⁵ In light of the limited circumstances under which we will grant primary status, the Commission does not believe that it will receive mutually exclusive applications.

establish that our microwave relocation procedures are not being abused, and that the public interest would be served by the grant.

87. Comments. PCS licensees generally agree with our licensing policy, although some continue to argue that we should not grant any more 2 GHz licenses to incumbents either on a primary or a secondary basis.²⁴⁶ By contrast, microwave incumbents argue that our licensing policy is too restrictive, and that all modifications that do not add to the relocation costs of PCS licensees should receive primary status.²⁴⁷ Commenters also request clarification regarding how licenses with secondary status will be treated for purposes of relocation.²⁴⁸ PacBell suggests that we establish a procedure for dealing with secondary microwave incumbents who fail to cease operations on their secondary links at the appropriate time.²⁴⁹

88. Discussion. As of the effective date of the new rules, we will grant pending and newly filed applications for all major modifications and all extensions to existing 2 GHz microwave systems on a secondary basis. We will grant primary status for the following limited number of technical changes: decreases in power, minor changes in antenna height, minor location changes (up to two seconds), any data correction which does not involve a change in the location of an existing facility, reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and changes in equipment. All other modifications will be permitted on a secondary basis, unless (1) the incumbent affirmatively justifies primary status, and (2) the incumbent establishes that the modification would not add to the relocation costs of PCS licensees. We decline to adopt the suggestion made by PCS licensees that no modifications should be allowed even on a secondary basis, because some incumbents might not need to relocate for several years, and they should be permitted to make modifications to their systems during that time period.²⁵⁰ We also disagree with incumbents that our licensing policy should be expanded, because we believe that limiting primary site grants is necessary to protect the interests of PCS licensees. In sum, we believe that granting secondary site authorizations serves the public interest, because it balances existing licensees' need to expand their systems with the goal of minimizing the number of microwave links that PCS licensees must relocate.

89. Furthermore, we clarify that secondary operations may not cause interference to operations authorized on a primary basis, and they are not protected from interference from

²⁴⁶ AT&T Comments at 13, PrimeCo Comments at 19.

²⁴⁷ API Comments at 18, UTC Comments at 28-29.

²⁴⁸ See, e.g., AT&T Comment at 13 and n. 42.

²⁴⁹ PacBell Reply Comments at 15.

²⁵⁰ AT&T Comments at 13, PrimeCo Comments at 19.

primary operations.²⁵¹ Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to a PCS licensee.²⁵² However, prior to commencing operations, PCS licensees are obligated to provide all incumbents that are operating within interference range, regardless of whether an incumbent is operating under a primary or a secondary site authorization, with thirty days notice that they will be commencing operations in the vicinity.²⁵³ Finally, PCS licensees are under no obligation to pay to relocate secondary links that exist within their market area and frequency block.

D. Application to Other Emerging Technology Licensees

90. Background. The microwave relocation rules that we adopted in the *Emerging Technologies* proceeding apply to all emerging technology services.²⁵⁴ In the *Cost-Sharing Notice*, we requested comment on whether the changes and clarifications we proposed should also apply to all emerging technology services, including non-PCS services (e.g., 2110-2150 and 2160-2200 GHz) that have not yet been licensed.²⁵⁵

91. Comments. AT&T contends that the rules that we adopt in this proceeding should also apply to other emerging technology licensees, even though the services in the 2110-2150 and 2160-2200 GHz have not yet been licensed.²⁵⁶ Other commenters argue that each service should have a service-specific rulemaking proceeding to take into account the unique technical, financial, and other considerations presented by each service.²⁵⁷

92. Discussion. We agree with AT&T that the cost-sharing plan and rule clarifications adopted in this proceeding should apply to all emerging technology services, including those services in the 2110-2150 and 2160-2200 GHz band that have not yet been licensed, because the microwave relocation rules already apply to all emerging technology services.²⁵⁸ For the same reasons that these changes will facilitate the deployment of PCS, we

²⁵¹ See, e.g., 47 C.F.R. § 90.7.

²⁵² 47 C.F.R. § 94.59(c). See generally *P&R Temmer v. FCC*, 743 F.2d 918, 928 (1984) (a licensee whose right to the use of a frequency is contingent on satisfying specified conditions has no right to use of the frequency when the conditions are not met).

²⁵³ See 47 CFR §§ 24.237(c), 21.100(d).

²⁵⁴ *ET First Report and Order*, 7 FCC Rcd 6886.

²⁵⁵ *Cost-Sharing Notice*, 11 FCC Rcd at 1925, ¶ 3.

²⁵⁶ AT&T Comments at 11 and n. 30.

²⁵⁷ PacBell Reply Comments at 10; see also ComSat Reply Comments at 2; Duke Power Reply Comments at 3.

²⁵⁸ AT&T Comments at 11 and n. 30.

believe these changes will also facilitate the deployment of other emerging technology services. For example, these changes and clarifications will provide additional guidance and help to accelerate negotiations between the parties. However, as new services develop, we may review our relocation rules and make modifications to these rules where appropriate.²⁵⁹ In addition, while we conclude that cost-sharing should apply to all emerging technology services, we do not adopt specific cost-sharing rules for new services at this time, but will develop such rules in future proceedings.

V. FURTHER NOTICE OF PROPOSED RULE MAKING

93. In this *Further Notice of Proposed Rule Making*, we seek comment on whether to shorten the voluntary negotiation period and lengthen the mandatory negotiation period for the D, E, and F blocks. We also seek comment on whether the negotiation periods for the C block should be subject to the same readjustment. Finally, we propose that microwave incumbents be permitted to relocate some of their own links and obtain reimbursement rights pursuant to the cost-sharing plan adopted in the *First Report and Order*.

A. Voluntary and Mandatory Negotiation Periods For C, D, E, and F Blocks

94. Background. As noted in Section IV(A)(1), *supra*, many PCS licensees have urged the Commission to shorten or eliminate the voluntary negotiation period. In the *First Report and Order*, we decline to alter the negotiation timetable currently applicable to the A and B Block licensees, because these licensees were on notice of the current rules when they bid for their licenses, and because negotiations between microwave incumbents and A and B block licensees are ongoing.²⁶⁰

95. Discussion. We agree with commenters, however, that changing the negotiation timetable for PCS blocks other than the A and B blocks may not raise the same concerns. In the case of the D, E, and F blocks, bidding has not commenced and there are no ongoing negotiations between PCS licensees and incumbents. Therefore, we believe it is appropriate to consider whether the relocation process in these blocks would benefit from adjusting the negotiation periods. Specifically, we seek comment on whether to adjust the negotiation periods for the D, E, and F blocks by shortening the voluntary negotiation period by one year and lengthening the mandatory period by one year. Under this approach, non-public safety incumbents would have a one-year negotiation period instead of the two-year negotiation period provided under current rules, and the mandatory negotiation period would be

²⁵⁹ For example, we have proposed relocation rules for incumbents in the bands allocated to the Mobile-Satellite Service (MSS). See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Notice of Proposed Rule Making*, ET Docket No. 95-18, 10 FCC Rcd 3230 (1995). Our decision today does not preclude us from tailoring our MSS relocation rules to the specific needs and requirements of MSS licensees and incumbents operating in the MSS band.

²⁶⁰ See Section IV(A)(1), *supra*.

lengthened from one to two years. Similarly, public safety incumbents would have a two-year voluntary negotiation period instead of a three-years period, and a three-year mandatory negotiation period instead of a two-year period .

96. This approach could potentially accelerate the development of PCS in the D, E, and F blocks by speeding up the negotiation process and creating additional incentives for incumbents to enter into early agreements. At the same time, while incumbents would be required to commence mandatory negotiations sooner than under the existing rules, they would have the same total amount of time for negotiations provided under the existing rules before they become subject to involuntary relocation. We seek comment on whether this adjustment would effectively balance the interests of PCS licensees in bringing service to the public quickly and the interest of microwave incumbents in making a smooth transition to relocated facilities.

97. Finally, we seek comment on whether to make the same changes discussed above to the voluntary and mandatory negotiation periods applicable to C block. We note that C block is in a different posture from the D, E, and F blocks because the C block auction is ongoing and possibly near conclusion, and bidding has been based on the current rules. At the same time, the voluntary negotiation period for C block has not yet commenced, so unlike A and B blocks, there are no ongoing negotiations currently taking place in reliance on the current rules. We seek comment on whether shortening the voluntary period and lengthening the mandatory negotiation period for C block would facilitate the development of PCS in this band and what effect it would have on negotiations between C block licensees and microwave incumbents.

B. Microwave Incumbent Participation in Cost-Sharing Plan

98. Background. Several commenters to our *Cost-Sharing Notice* suggest that microwave incumbents who relocate links themselves should be permitted to collect reimbursement in accordance with our cost-sharing plan.²⁶¹ They argue that microwave incumbents may wish to pay to relocate some of their own links so that they can relocate their entire system at once, instead of waiting for PCS licensees to relocate links one at a time as the need arises.²⁶² Thus, commenters urge the Commission to allow microwave incumbents to participate in the cost-sharing plan and obtain the reimbursement rights for their respective links.²⁶³

99. Discussion. We tentatively conclude that microwave incumbents that relocate themselves should be allowed to obtain reimbursement rights and collect reimbursement under

²⁶¹ See, e.g., API Reply Comments at 17-18.

²⁶² *Id.*

²⁶³ *Id.*

the cost-sharing plan from later-entrant PCS licensees that would have interfered with the relocated link. We agree with incumbents that allowing incumbent participation might facilitate system-wide relocations and could potentially expedite the deployment of PCS. We are concerned, however, about what the incentive would be for an incumbent to minimize costs, if the incumbent knows in advance that it may be able to recover some of its expenses from PCS licensees. We seek comment, therefore, on how subsequent PCS licensees could be protected from being required to pay a larger amount to an incumbent that relocates itself than to another PCS licensee who has an incentive to minimize expenses. In addition, we also question whether a large number of incumbents would avail themselves of such an option, given that our rules require PCS licensees to pay for the entire cost of providing incumbents with comparable facilities.²⁶⁴ Assuming we allow incumbent participation, we seek comment on whether, for purposes of the cost-sharing formula, we should treat incumbents as if they were the initial PCS relocater.

VI. CONCLUSION

100. We believe that the rules adopted in this *Report and Order* will promote the public policy goals set forth by Congress. The cost-sharing formula adopted herein will facilitate the rapid relocation of microwave facilities operating in the 1850 to 1990 MHz band, and will allow PCS licensees to offer service to the public in an expeditious manner.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

101. As required by Section 603 of the Regulatory Flexibility Act, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in WT Docket No. 95-157, RM-8643. The Commission has prepared a Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written comments were requested. The Commission's final analysis is as follows:

102. Need for and purpose of the action: This rulemaking proceeding has implemented Congress' goal of encouraging emerging technologies and bringing innovative commercial wireless services to the public in an efficient manner. The cost-sharing plan will promote the efficient relocation of microwave licensees by encouraging PCS licensees to relocate entire microwave systems rather than individual microwave links. A cost-sharing plan is necessary to enhance the speed of relocation and provide an incentive to PCS licensees to negotiate system-wide relocation agreements with microwave incumbents. This action will result in faster deployment of PCS and delivery of service to the public. We have also clarified some terminology regarding certain aspects of the Commission's rules for microwave relocation contained in the Commission's *Emerging Technologies* proceeding, Docket No. 92-

²⁶⁴ 47 C.F.R. § 94.59(c)(1).

103. Issues raised in response to the IRFA: The American Public Power Association ("APPA") states that conversion of 2 GHz microwave systems to secondary status in the year 2005 would have a particularly severe impact on the limited budgets of small, non-profit public utility systems.²⁶⁵

104. Significant alternatives considered and rejected: Although we have decided not to convert microwave incumbents to secondary status automatically as we proposed in the *Cost-Sharing Notice*, they will be required to pay for their own relocation costs after the sunset date. We have considered the impact of the ten year sunset date, and we have determined that the benefits of imposing a sunset date outweigh the burdens such a date may impose on these incumbents. For further discussion, see Section IV(A)(6), *supra*.

105. With respect to this *Further Notice of Proposed Rule Making*, an Initial Regulatory Flexibility Analysis is contained in Appendix D. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.²⁶⁶

B. Ex Parte Rules - Non-Restricted Proceeding

106. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.²⁶⁷

C. Comment Period

107. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **May 28, 1996**, and reply comments on or before **June 7, 1996**.²⁶⁸ To file formally in this proceeding, you must

²⁶⁵ APPA Comments at 6-7.

²⁶⁶ Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

²⁶⁷ See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

²⁶⁸ See 47 C.F.R. §§ 1.415 and 1.419.

file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. A copy of all comments should also be filed with the Commission's copy contractor. ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857-3800.